IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

O R D E R

S.B. CRIMINAL REVISION PETITION NO.192/2007
(Khema Ram Vs. State & Ors.)

Date of order : May 07th, 2007

P R E S E N T

HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. G.R. Punia, for the petitioner.
Mr. Ashok Upadhyay, Public Prosecutor.
Mr. M.K. Garg, for the non-petitioners.

By way of filing the present revision petition, the petitioner has prayed for quashing of impugned order dated 25.8.2006 passed by learned Addl. Sessions Judge (Fast Track) No.2, Bikaner in Sessions Case No.80/2004 whereby the application filed by the petitioner-complainant under Section 319 Cr.P.C. was dismissed.

According to the facts narrated inter alia in the revision petition, a FIR was filed on the basis of statement of deceased Rekharam at Police Station Loonkaransar. The said FIR was registered as FIR No.44/2004. According to the statement of deceased Rekharam, when he was going to a doctor for taking

medicine at about 9.30 p.m. on 09.02.2004 in village at that time, near Thakurjis temple, Bheeka Ram S/o Rawat Ram, Het Ram, S/o Rawat Ram, Surja Ram S/o Asha Ram, Shankarlal S/o Bheeka Ram, Chandu Ram S/o Ganesha Ram, Bhanwarlal S/o Dana Ram and Dana Ram S/o Sohan Lal along with other 4 – 5 persons all residents of village Khokhrana arrived there and assaulted him. It was specifically stated that Hetram inflicted Kulhari blow and Surja Ram and Shankarlal gave lathi blows. As as result, he fell down and thereafter all other accused persons gave beating to him.

After registration of the FIR, investigation commenced but during investigation injured - Rekha Ram died. Therefore, offence under Section 302 I.P.C. was added and after usual investigation, challan was filed.

It is contended by the learned counsel for the petitioner that though there was sufficient material on record as per the evidence collected during investigation against the non-petitioners namely Roopa Ram @ Bhup Ram S/o Rawat Ram, Chandu Ram S/o Rawant Ram and Shankarlal @ Shyopat Ram S/o Bhika Ram but the investigating agency has not charge-sheeted them and thereafter during trial after recording the statement of petitioner (PW-3) and one Om Prakash – PW-4, an application for taking cognizance against the above persons was filed and

they were sought to be arrayed as accused persons because from their statements, it appeared that all these persons took part in the alleged incident. However, the learned trial court vide impugned order dated 25.8.2006 rejected the said application, which is totally erroneous.

Learned counsel for the petitioner has invited the attention of the Court towards the judgment rendered in case of Lok Ram Vs. Nihal Singh Singh, reported in 2006 AIR SCW 2129 and prayed that there is sufficient material on record against the non-petitioners for summoning them and arrayed them as accused. Therefore, the learned trial court has committed an error while rejecting the application filed under Section 319 Cr.P.C.

On the other hand, learned counsel for the non-petitioners has contended that FIR was registered on the basis of statement of deceased Rekha Ram and in his statement, no allegation was made against Roopa Ram @ Bhup Ram S/o Rawat Ram, Chandu Ram S/o Rawat Ram and though the name of Shankar lal @ Sheopat Ram S/o Bhikha Ram finds place in the FIR but in the investigation he was not found to be an accused. It is also contended that in this case, investigation was conducted thrice in the matter and in all the three investigations, the non-petitioners were not found to be accused because there was no evidence against them.

It is contended that the prosecution witness PW-4 - Om Prakash, who was planted as eye-witness subsequently and PW-3 Khema Ram, both were cross-examined and in their cross-examination, it is admitted that they falsely implicated one Chandu Ram S/o Ganesha Ram in this case whereas Chandu Ram S/o Ganesha is one of the accused in this case. Therefore, obviously their testimony cannot be treated to be trust-worthy.

Learned trial court after considering and discussing entire evidence rejected the application filed under Section 319 Cr.P.C.

In the statement of deceased Rekha Ram, he has specifically named one Chandu Ram S/o Ganesha Ram against whom the challan has been filed but in the statement of PW-3 Khema Ram – petitioner, he has stated that six persons inflicted injuries to his brother deceased Rekha Ram. With regard to statement of PW-4 Om Prakash, he has also named six persons who were said to be present at the time of occurrence. It is specifically stated by him that on 9.2.2004 when he was going towards the temple, from his field, he saw that some persons namely Bhikha Ram S/o Rawat Ram, Chandu Ram S/o Rawat Ram, Het Ram S/o Rawat Ram, Bhup Ram S/o Rawat Ram, Shankar Lal S/o Bhikha Ram and Hari Ram S/o Phusa Ram, were assaulting deceased Rekha Ram. Meaning thereby, both these persons have named six persons whereas the deceased Rekha Ram in his

statement specifically narrated the whole incident. After taking into account statement of PW-3 – Khema Ram and PW-4 – Om Prakash, learned trial court has arrived at with the finding that both these witnesses have categorically stated that one Chandu Ram S/o Ganesha Ram was falsely implicated in this case. Whereas as per the statement of deceased, he has named Chandu Ram S/o Ganesha Ram against whom charge-sheet was filed. Learned trial court after discussing entire evidence has come to the conclusion that there is no conclusive evidence upon which there is possibility of conviction is on record, therefore, as per the judgment of Hon'ble Supreme Court in Michael Machando & Anr. Vs. Central Bureau of Investigation & Anr., reported in (2000) (3) SCC 262, there is no evidence to add the non-petitioners as accused in this case for trial.

I have perused the entire evidence of the case and in my opinion, the learned trial court has rightly rejected the application filed under Section 319 Cr.P.C. because as per the catina of judgment of Hon'ble Supreme Court, it has been held that Section 319 Cr.P.C. is intended to meet the situation wherein court of trial, if material comes up against some persons, who have not been arrayed as accused and are not being tried, the court can summon and therefore, for summoning an accused there must be material evidence on record, then, the accused can be arrayed.

But at the same time, the Hon'ble Supreme Court in Rakesh & Another Vs. State of Haryana, reported in (2001) 6 SCC 248 has held that power under Section 319 Cr.P.C. is extra ordinary power and should be used very sparingly and only if some compelling reasons exist for taking cognizance against other persons against whom action had not been taken.

In the very recent judgment rendered by Hon'ble Supreme Court in case of Lok Ram Vs. Nihal Singh, reported in 2006 AIR SCW 2129, the Hon'ble Supreme Court has held in para-12 as follows :

> "12. Power under Section 319 of the Code can be exercised by the Court suo motu or on an application by someone including accused already before it. If it is satisfied that any person other than accused had committed an offence he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word 'evidence' in Section 319 contemplates that evidence of witnesses given in Court. Under sub-section (4) (1) (b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of sub-section (4) (1) (b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned."

The Hon'ble Supreme Court in the aforesaid judgment in case of Lok Ram Vs. Nihal Singh (supra), while relying upon the judgment given in case of Michal Machado & Anr. Vs. Central Bureau of Investigation & Anr., reported in 2000 (3) SCC 262 and another judgment given in case of Krishnappa Vs. State of Karnataka, reported in (2004) 7 SCC 792, has held that the power to summon an accused is extra ordinary power conferred on the court. It is discretionary and should be exercised very sparingly and only if some compelling reasons exists against other persons against whom action had not been taken. Accordingly, in the present case, learned trial court has rightly arrived at the finding that there is no material on record upon which the power under Section 319 Cr.P.C. are required to be exercised. the learned trial court while discussing the entire evidence and taking into account the statement of deceased Rekha Ram and on the basis of major contradiction and false implication in the statements of PW-3 Khema Ram and PW-4 – Om Prakash has rightly arrived at the finding that there is no sufficient evidence at this stage upon which it can be said that newly arrayed persons could be convicted on the basis of said evidence. It is also observed in the impugned order that at this stage, the application of complainant filed under Section 319 Cr.P.C. is not required to be accepted. It is also observed that anything said in the order with regard to the statement of PW-3 Khema Ram and PW-4 Om Prakash, will

be treated to be a discussion for the purpose of deciding the application under Section 319 Cr.P.C. and it will not affect the final decision and merit of the case.

In these circumstances, I see no reason to interfere with the order passed by learned trial court. Accordingly, the petition is dismissed.

(GOPAL KRISHAN VYAS), J.

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